

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

USAMA J. HAMAMA, et al,

Petitioners and Plaintiffs,

-v-

Case No. 17-cv-11910

REBECCA ADDUCCI, et al,

Respondents and Defendants.

\_\_\_\_\_ /

STATUS CONFERENCE

BEFORE THE HONORABLE MARK A. GOLDSMITH

Detroit, Michigan, Thursday, August 31st, 2017.

APPEARANCES:

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WITNESSES:

EXHIBITS

NONE

1 Detroit, Michigan.

2 Thursday, August 31st, 2017.

3 At or about 2:08 p.m.

4 -- --- --

5 THE CLERK OF THE COURT: Please rise. The United  
6 States District Court for the Eastern District of Michigan is  
7 now in session, the Honorable Mark Goldsmith presiding. You  
8 may be seated.

9 The Court calls case number 17-11910, Hamama versus  
10 Adducci. Counsel, please state your appearances for the  
11 record.

12 MS. AUCKERMAN: Miriam Auckerman, ACLU of Michigan  
13 for the petitioners.

14 MS. SCOTT: Good afternoon, your Honor. Kimberly  
15 Scott from Miller Canfield on behalf of the petitioners.

16 MR. STEINBERG: Michael J. Steinberg, ACLU of  
17 Michigan for the petitioners.

18 MS. YOUSIF: Nadine Yousif, Code Legal Aid, on behalf  
19 of the petitioners.

20 MS. RICHARDS: Wendolyn Richards on behalf  
21 petitioners.

22 MR. SILVIS: William Sylvis, Department of Justice on  
23 behalf of the petitioners.

24 THE COURT: All right. Good afternoon, everybody.  
25 Have a seat. We're having a status conference in the case now

1 that the preliminary injunction has been in effect since July  
2 24 and the parties submitted last night status reports which  
3 are quite lengthy, but the Court nonetheless has reviewed both  
4 the petitioners' report and the respondent's report.

5 It appears that there are a number of issues that  
6 need to be worked out either by the parties or by me if you  
7 can't work them out. It appears that at least for some of  
8 these issues you seem to be continuing to talk and perhaps are  
9 making some progress. There's also a suggestion that perhaps  
10 it would be helpful to meet with the magistrate judge who is  
11 assigned to this case for some assistance in a resolution of  
12 some of the issues or perhaps a global resolution if possible.

13 So my first question is an essay question really in  
14 terms of what process would be most effective here. I have a  
15 few and I'm not advocating any one at this point. I wanted to  
16 raise it with you and see what your thinking might be as to  
17 what would be a prudent way to proceed.

18 One way to proceed would be to have you continue to  
19 talk and also have you meet with the magistrate judge to see  
20 what issues could be worked out with his assistance and again  
21 those could be discrete issues that you've identified here in  
22 the status reports or they could be more of a global nature if  
23 that's possible. Whatever you were not able to resolve, you  
24 could then bring back to me in a second round. You'd give me  
25 an updated report and then I would at that point address

1 resolution of those unresolved issues.

2 A second possibility is not to involve the magistrate  
3 judge at all. We could just proceed to have you folks continue  
4 your discussions for a period of time and then I would sit down  
5 with you and see what is left for me to resolve. That sit-down  
6 would be preceded by an updated status report to let me know  
7 exactly what needs to be resolved and what the parties'  
8 positions are and under that second scenario if the parties  
9 thought it would be helpful to meet with the magistrate judge  
10 to talk about a global resolution, if you'd prefer to do that  
11 as opposed to having me be part of that discussion, we could  
12 arrange for that to happen as well. So those are at least two  
13 ideas I had as ways that we could address at least what  
14 currently separates the two sides. I'm open to hearing other  
15 suggestions. As I say, I'm not advocating at this point for  
16 any particular solution. Let me hear from petitioners.

17 MS. AUCKERMAN: Thank you, your Honor and I  
18 appreciate that the Court looked at everything despite the late  
19 hour that it was filed and I, umm, I just want to say that the  
20 parties have actually been working very well together on a lot  
21 of issues. The fact that it wasn't a joint report was simply a  
22 function of us not being able to get that in by 7:00 last  
23 night, but the parties have actually been working very well  
24 together and have reserved -- resolved a lot of, a lot of  
25 issues.

1           As we indicated in our status report, we are more  
2   than prepared to sit down with the government to try to resolve  
3   this on a global basis and I think we've also had success  
4   resolving a lot of data issues, a lot of smaller issues along  
5   the way. It's a complex case and as a result of that, there  
6   are issues that are not resolved.

7           I think there are a number of issues here that we've  
8   really reached an impasse at, in particular some of the issues  
9   around coercion, some of the issues -- not some of the new  
10   allegations around coercion, but the issues with respect to how  
11   individuals would voluntarily remove themselves from the  
12   protection of this Court's order. We're very concerned about  
13   that. The parties have discussed that extensively and really  
14   reached an impasse, so on that particular issue I'm not sure,  
15   for example that further discussion would be particularly  
16   helpful. We also have reached an impasse on some of the  
17   reporting issues despite a lot of discussion between the  
18   parties.

19           There are sort of two big buckets here of issues; one  
20   with respect to coercion and one with respect to reporting so  
21   there are definitely issues where I feel I believe further  
22   discussion either between the parties or facilitated discussion  
23   would be useful, but I also think that it is extremely -- that  
24   it would be very helpful to have the Court's guidance on a  
25   number of the things that are before the Court today with

1 respect to the pressure that's being placed on individuals to  
2 give up their rights and I don't know if the Court had an  
3 opportunity to read the declarations that were submitted as  
4 attachments. They're extremely disturbing in terms of what's  
5 happening to our clients and so we're very concerned about that  
6 and we don't really want that put off, but at the same time  
7 we're very -- we're quite prepared to sit down and work on some  
8 of the issues where there hasn't been an impasse without --  
9 either with the magistrates or without involving the Court so I  
10 think there's kind of a combination of issues where we need the  
11 Court's guidance and issues that are sort of issues that merit  
12 further, further discussion and negotiation, facilitator or not  
13 between the parties and we'd certainly welcome facilitation and  
14 then on the global issues, we have been as you know from the  
15 onset prepared to talk with the government about what that,  
16 that might involve and, you know, one of our principal concerns  
17 now is the fact that these individuals, you know, if you sort  
18 of look at the big picture of this situation here, you know,  
19 it's been almost three months since these individuals were  
20 arrested and they've been in detention. They've been  
21 incarcerated. Very few have been released, you know, almost  
22 288 people are detained. We've been working hard to get them  
23 lawyers. About 158 of them have attorneys, 61 don't, about 69  
24 we simply don't know and it's very hard for individuals to move  
25 forward with their immigration cases because of the delays in



1 the production of the A-files and the records of proceeding and  
2 so, you know, that the result of that is that the detainees are  
3 becoming increasingly despondent about the prospect of  
4 prolonged detention. You know, if you read these declarations,  
5 they talk about how ICE officers have come up and said, you  
6 know, you can either stand in line here to sign this form or,  
7 you know, you can spend, you know, you're going to stay  
8 detained for a year and-a-half, you're going to remain  
9 incarcerated for a year and-a-half if you don't sign this form  
10 and, you know, then we can get you out of detention and so, you  
11 know, three months is a long time and for individuals who are  
12 facing this prolonged detention, the fact, the sort of  
13 combination of delays coupled with detention, it's not that  
14 we're saying the government, you know, is stalling in terms of  
15 producing this, it's just that they're also requiring people to  
16 be separated from their families, from their jobs, to be  
17 incarcerated while all of this is going on and so, you know,  
18 it's a very coercive situation.

19 So anyway, to get back to your question, you know, we  
20 would like to -- we'd certainly be happy to talk about a global  
21 resolution and resolve some of the other, some of the smaller  
22 issues that are, where further discussion would be productive,  
23 but we do think there are some issues where we've really  
24 reached an impasse despite quite a lot of discussion between  
25 the parties.

1           THE COURT: All right. So do you have a preference  
2 regarding how we move forward here or would you want to have  
3 magistrate judge sit down with you to look at these discrete  
4 issues that you've raised in the status reports? Would you  
5 rather not follow that route and just have me resolve them?  
6 Give me your view of what you'd prefer to see happen here.

7           MS. AUCKERMAN: I guess what we would prefer is to  
8 move forward with, umm, and talk about some of the issues today  
9 with your Honor, get some guidance from the Court on these  
10 issues and then, you know, as we're going through them, we can  
11 say that is issue that, you know, we think the parties can  
12 simply resolve, this is an issue that might need 'cause there  
13 are a lot of issues. I mean, one of the things that might be  
14 helpful given the case's complexity is instead of having  
15 ongoing status conferences or something because we're aware  
16 that a lot of things have accumulated and the Court is  
17 presented now with the sort of long list of things that really  
18 fall into these two buckets of coercion and reporting, but  
19 there are a lot of issues to resolve and there's things, for  
20 example, with respect to the protective order, cases are moving  
21 in the immigration court system. We need to have the Court's  
22 assurance that we don't think there's even an issue with that,  
23 but that needs to get addressed sooner rather than later so  
24 that we can start filing amicus briefs in the immigration  
25 system so there's a bunch of issues that are time sensitive so

1 I'm concerned about the sort of the ones that are time  
2 sensitive and we'd like to get some, some guidance from the  
3 Court on those issues.

4 THE COURT: Okay. All right, Mr. Sylvis?

5 MR. SILVIS: Thank you , your Honor. Just to answer  
6 the specific question the Court asked just about the process, I  
7 think it would make sense. I think we have reached impasse on  
8 several of these issues and it would be probably the best to  
9 sit down with the Court today and talk through some of those  
10 and some of them that may be meatier or takes more time, we  
11 would of course not object to meeting with the magistrate judge  
12 as well, but I think there are some issues that require more  
13 immediate attention.

14 Just to answer your questions, I could go into detail  
15 about the affidavits that were served on us basically  
16 simultaneously with the Court and that we ask the Court not to  
17 consider those, but we can get into that in more detail later  
18 if you'd like, but particularly with those allegations in  
19 coercion, I mean, we're learning about those at the same time.  
20 We've asked for details; we didn't get them. You can see from  
21 many of these declarations that they're signed almost the same  
22 day as the filing. So we're looking into them, we've also  
23 asked for this information and we take them very seriously, but  
24 to the extent that you would consider any of those affidavits  
25 with any decisions today, we ask that you hold off on doing

1 that until we've really had an opportunity to review them. I  
2 mean, for example, for one of the declarations, we had a chance  
3 it was served yesterday, we looked up, we believe we've located  
4 the individual they're discussing and we found that a lot of  
5 the facts are simply incorrect and we have our own affidavit  
6 that we could offer as well to sort of explain that, so the  
7 point being is there's two sides to these. You know, we're  
8 kind of sandbagged with these declarations at the last minute  
9 so we'd like to at least have an opportunity to respond to  
10 those to the extent that the Court was going to rely on them,  
11 but that being said, I think the Court's question was a more  
12 direct one as to the process and I think it would be very  
13 helpful to sit down today and, you know, talk through some of  
14 these issues.

15 THE COURT: All right. Do you want to sit down in  
16 our jury room or you want do it here or do you not care?

17 MR. SILVIS: It's your Honor's preference.

18 THE COURT: Do the petitioners care where we do this?

19 MS. AUCKERMAN: Whatever your Honor prefers.

20 THE COURT: All right. Well, let me do this then.

21 It sounds like both sides would like to at least identify what  
22 are the issues are -- what the issues are that either are at an  
23 impasse at this point or are going to require some further  
24 investigation and study, so I'm just going to start with the  
25 petitioners' status report.

1           Well, let me start with at least the following issue  
2       which I think may be discussed in a few places in the report  
3       and that has to do with efforts to obtain counsel for detainees  
4       who are currently unrepresented. Page seven and eight of the  
5       report discuss that. The report states that petitioners'  
6       counsel's working with a national law firm to address that  
7       issue. What specifically would you want the Court to do in  
8       regard to that? I'm talking about the broad issue of getting  
9       counsel to those who are currently unrepresented. What if  
10      anything do you want the Court to do about that?

11           MS. AUCKERMAN: So, there are two -- this, you know,  
12      this ties -- in terms of sort of the process of accessing  
13      counsel, we are working with a lot of different national law  
14      firms which this sort of national coordination going on around  
15      that. There are a number of different pieces there that are  
16      relevant for this Court today. There are issues related to our  
17      request that ICE be prohibited from discussing the case with  
18      detainees. If you look at the declarations and I understand  
19      that Mr. Sylvis is saying that these issues, he got the  
20      declarations recently. We've raised these issues with him,  
21      some of these issues with him at the beginning of August on a  
22      phone call including the location, but, you know, if you look  
23      at these issues, if you look at the declarations --

24           THE COURT: Let me -- I'm sorry to interrupt you, but  
25      is this goes to be just a coercion kind of analysis?

1 MS. AUCKERMAN: Right. The detainees are saying that  
2 they're being told if you get a lawyer, if you fight your  
3 deportation, you're going to be, you know, if you fight your  
4 deportation, you're going to be in detention for a year  
5 and-a-half, you know, and so the detainees are saying we're not  
6 getting lawyers, but they're afraid to get lawyers because they  
7 are afraid of prolonging detention --

8 THE COURT: No, I understand that. I just want to  
9 know is there something else in connection with getting lawyers  
10 that you want the Court to address other than the coercion  
11 issue?

12 MS. AUCKERMAN: So there are two -- there are two  
13 other issues. One has to do with a protective order and there  
14 are two pee -- or I should say there's one issue that sort of  
15 has two parts to it. A lot of these cases, umm, you know,  
16 there's a very large volume of these cases now going before the  
17 immigration courts. That creates, you know, a logistical issue  
18 for the immigration courts because they don't necessarily want  
19 to hold, you know, 288 hearings on country conditions in Iraq.  
20 The same time for class members, there are issues with respect  
21 to getting, you know, access to experts and so forth because  
22 there's a limited number of experts and so one of the issues is  
23 sort of can we find a way to coordinate all of that. That's  
24 not your Honor's problem except to the extent that it  
25 implicates the protective order.

1           It is our view that we should share information -- we  
2           should be able to share essentially what's the kind of  
3           immigration court equivalent of docket information, right, so  
4           the name, A number and the status of the proceeding and the  
5           attorney so we can identify how many cases, you know, who are  
6           all the attorneys who have cases in the Detroit immigration,  
7           you know, before the Detroit immigration judges and then try to  
8           work with those individuals to coordinate some of these  
9           logistical issues. Our view is that that not confidential or  
10          protected information and therefore we should be able to share  
11          it. The government disagrees on that and so that's an issue.  
12          We want to be able to move forward with that because those  
13          proceedings are moving quickly.

14                There's a similar issue with respect to the  
15          Immigration, to the amicus effort before the Board of  
16          Immigration Appeals. There are a number cases that are at the  
17          BIA level now. In those cases, the Hamama counsel, the  
18          organizations involved so it would be the ACLU of Michigan, the  
19          National ACLU, Michigan Human Rights Center Iraq and Code are  
20          planning to file amicus briefs to help educate the BIA. A lot  
21          of these motions were filed on an emergency basis very early  
22          on, very bare bones without a lot of the, you know, without  
23          having the A files, without having the RIPS, without having  
24          countries experts, all of those sorts of things. We think that  
25          the BIA would appreciate and we would certainly want the

1 opportunity for the Hamama petitioners, the organizations  
2 representing the Hamama class to be able to file amicus briefs.  
3 That requires as a practical matter again the ability to share  
4 what's docket information, right, so name, A number, counsel  
5 and the status of the proceeding with a law firm that's offered  
6 to coordinate that amicus filing effort, you know, which  
7 requires filing a lot of the same amicus brief in lots of the  
8 different filings, so mechanically for your Honor the question  
9 is really can we share that information. We don't think in  
10 having looked at the protective order that it's covered by the  
11 scope of that, but we certainly would not want do anything that  
12 would violate this Court's order.

13 THE COURT: Okay. So in terms of the issue of  
14 getting lawyers to the unrepresented detainees, there are two  
15 major issues. One is the coercion issue and one is this  
16 sharing of information?

17 MS. AUCKERMAN: Right. That's actually more about  
18 coordinating the representation of the ones who are represented  
19 and whose cases are either before IJs or in the BIA. The  
20 unrepresented, it's really more a question of sort of coercion.  
21 Also I should add issues around notice of transfer because  
22 again the transfer has continued to be an issue. If we, you  
23 know, if we have a law firm that says hey we'll go out and  
24 we'll interview these people, if we can't figure out where  
25 people are and information that we got can be three weeks out



1 of date because we get it about a week old. There's a two-week  
2 gap in the amount of time, you know, two-week reporting cycle  
3 so by the end of the reporting cycle, the information we have  
4 is three weeks old.

5           There is an online detainee locator. Some of the  
6 issues with respect to Youngstown have been addressed. We  
7 checked that this morning and we appreciate the government  
8 fixing that issue, but there are other issues with respect to  
9 the online locator where we, you know, when the detainees were  
10 moved from Florence. It took days to figure out where they'd  
11 ended up, you couldn't figure it out on the online locator and  
12 so we can't get lawyers to people if we don't know where they  
13 are and so that's an issue. We had asked in the status report  
14 for notice that and we would also be willing to accept simply  
15 the government's assurance that if we call the field office,  
16 they could tell us where these people are and let us actually  
17 go see them. We've had issues with trying to go visit clients,  
18 being told no, you can't, you know, you can't go in for another  
19 week, you don't have a D28 on file, you can't go for a week,  
20 that kind of thing so we really, you know, it's hard for us if  
21 people are being moved around, we don't know where they are,  
22 those kinds of things so those are the issues that have impeded  
23 representation.

24           THE COURT: All right. Now are any of these issues  
25 impasse issues as you view them?

1 MS. AUCKERMAN: Well, certainly the coercion issue is  
2 an impasse issue. The protective order issue is just recently  
3 arisen. I don't know, I'll let Mr. Sylvis tell you if that's  
4 an impasse issue or not.

5 THE COURT: Well, I heard Mr. Sylvis say they're  
6 investigating these claims of coercion and that in some  
7 instances, maybe all the instances they've just learned about  
8 them so why would that be an impasse issue at this point if  
9 they're still looking into it?

10 MS. AUCKERMAN: The impasse issue has more to do I  
11 guess with the voluntary departure piece which is separate and  
12 then the --

13 THE COURT: I'm sorry, the voluntary what?

14 MS. AUCKERMAN: The issue of voluntary departures, so  
15 individuals who, you know, being asked to sign forms. There,  
16 we are definitely at an impasse. That issue is at an impasse.  
17 With respect to the, our request that ICE officers not  
18 communicate regarding the, this litigation, the parties  
19 obviously disagree on that issue as well. While I think  
20 there's a desire by, you know, although -- they would like to  
21 provide their counter-affidavits. We have, you know, I'm not  
22 sure that that's an issue that's going to be -- certainly the  
23 Court may would not more evidence on that issue, but that's a  
24 different issue about whether it's a resolvable issue because I  
25 think our position is going to be that, you know, this coercion

1 is happening and that we want to have that prohibition on  
2 communication regarding the litigation because that's what  
3 we're hearing from the detainees and I understand that  
4 Mr. Sylvis may be hearing different things from his clients.  
5 That's a, you know, that's an evidentiary issue rather, so and  
6 then the protective order issue, we do need to have, be able to  
7 move forward on that.

8 THE COURT: All right. I understand you need to move  
9 forward with that, but do you think you've exhausted your  
10 efforts at trying to work that out with the government?

11 MS. AUCKERMAN: Umm, yeah, unfortunately I think that  
12 may be one that we -- I mean, our view is that we need to be  
13 able to share this information and unless the government is  
14 willing to agree that we can or maybe it's a question of, I  
15 mean, the government's concern here is Privacy Act issues.  
16 Again, we don't think this information is even confidential to  
17 begin with, but if there are Privacy Act issues, you know, the  
18 provision of the Privacy Act specifically provide for  
19 exceptions for court orders. I can get you the cite on that if  
20 you want, your Honor, and so we don't see that as a being  
21 something that should stand in the way of what we think is a  
22 very reasonable and important effort to try to make sure that  
23 people, to make sure that the immigration courts have a  
24 logistically feasible way to handle these hundreds of cases and  
25 that the BIA has the information that it needs to make informed

1 decisions about the facts and the law in all of these cases.

2 THE COURT: All right. Well, you've talked in your  
3 report about releases and custody reviews. Is that an issue  
4 you think you've reached an impasse over?

5 MS. AUCKERMAN: That, I think we may -- I -- that may  
6 be worth some more discussion, but I, unless again the  
7 government has indicated that they're not willing to provide  
8 that information and that information is absolutely critical  
9 because, you know, our view is that these individuals should  
10 have had individualized custody reviews long ago. As a  
11 practical matter, many of them are coming up for 90 day  
12 reviews. We need to know the outcome of those reviews in order  
13 to determine how to proceed with respect to detention. You  
14 know, if those are real reviews and individuals are being  
15 released and these individuals were living out in the  
16 community, you know, reporting regularly under supervision.  
17 It's not clear to me why they need to be in detention when they  
18 were reporting regularly before under orders of supervision and  
19 so, you know, these individuals are just sort of rubber stamped  
20 continued detention, that is extremely concerning so we need to  
21 have that information. That's, that's really, umm, critical  
22 for the future of these class members.

23 THE COURT: Well, I understand everything you put in  
24 your report is important. That's not what I'm trying to  
25 understand right now. What I want to know right now is what

1 issues would benefit from some further discussion with the  
2 government and what issues won't. That's what I'm trying to  
3 figure out right now.

4 MS. AUCKERMAN: Right. I don't think that issue is  
5 an issue where we're likely to make a lot of, a lot of  
6 progress. I should say -- well, I'll take that back a little  
7 bit. I think that, you know, we are willing to, umm, in light  
8 of some of the things that they've said, we're willing to sort  
9 of moderate our request a bit so maybe there is some room for  
10 discussion about exactly what information we would need and the  
11 related, the related piece of that, I mean, the detention  
12 issues are from our perspective very time sensitive which is  
13 why we attached the discovery request. We'd like those to be  
14 responded to very quickly.

15 You know, there's also this issue with Iraq. If  
16 individuals are being detained whom Iraq will not take back,  
17 right, we're under -- we have reports that not only that  
18 individuals can't get travel documents, but they're being told  
19 that Iraq will not take them back. If that's the case, their  
20 detention, every single day that they're detained is illegal  
21 because they're no likely to be removed in the foreseeable  
22 future so we need to have information about what's going on  
23 with, you know, whom Iraq is willing to take back, who they're  
24 not willing to take back, what's going on with that and the  
25 government is saying that, you know, that they won't provide

1     that information either. So we would like to move forward on,  
2     on that piece of discovery.

3             As we indicated, we don't think necessarily -- we  
4     think that sort of talking about global settlement is probably  
5     preferable to moving into full-scale discovery, but there is  
6     discovery with respect to detention issues that needs to move  
7     forward because there are almost 300 people sitting  
8     incarcerated, you know, right now.

9             THE COURT: All right and did the definition of the  
10    class, an issue's been raised regarding that. Is that  
11    something you're at an impasse?

12            MS. AUCKERMAN: I think actually that we, both of the  
13    parties may have framed that a little bit incorrectly so I  
14    think the answer is no. To your question, I think that's an  
15    issue -- so I think that there are two pieces to that. One is  
16    really kind of the class definition and the scope of the  
17    relief. Those are issues that are in the process of being  
18    briefed for the class certification motion so I don't really  
19    think that those need to be decided today. Those, there's a  
20    whole sort of separate briefing track around the class  
21    definition, but I think the piece of it that is really before  
22    the Court today and is about reporting and whether or not  
23    individuals -- so the sort of the discovery side of it, right,  
24    whether or not individuals who had their motion to reopen, you  
25    know, who filed on June 15th, had a motion to reopen on June

1 23rd, whether those individuals are included in the reporting  
2 requirements because what happened, what has happened is we  
3 don't know -- the government takes a position that once  
4 someone's motion to reopen is granted, that if they were  
5 granted before, they don't have to report on those so we don't  
6 know how many of those people there are, whether they were  
7 released, what the status of their cases is so we don't have a  
8 comprehensive sense of what's going on. So it's that, that  
9 piece of it I think we're at a bit of a loggerhead about, but  
10 the larger sort of class definition issue I think can be set  
11 aside for today.

12 THE COURT: What about class notice? Is that  
13 something that you've reached an impasse over?

14 MS. AUCKERMAN: So we were making very good progress  
15 on this issue and I thought that we had it resolved or were  
16 very close to resolved. The, umm, what the government proposed  
17 was that they -- we, you know, we prepared a notice, a sort of  
18 KYR know-your-rights document that was distributed at  
19 Youngstown as part of a know-your-rights presentation there.  
20 We modified that. We're going to send that out to class  
21 members.

22 There's also this issue of sort of the designation of  
23 the A-files and record of proceedings, who's going to get those  
24 documents when they're transmitted and where we, we had sort of  
25 an agreement on that, but I think we all agreed that it would

1 be simpler to do it that way rather than to have a  
2 court-ordered notice which would be the alternative.

3           Where the piece that we really ran into problems with  
4 where there really is just an impasse has to do with this issue  
5 of how people can -- people who want, who want to return to  
6 Iraq, what the process is for identifying those individuals and  
7 determining that their decision is knowing and voluntary and  
8 not coerced and our view is that, you know, we don't have a --  
9 hey, we've stipulated to removal of one individual already  
10 because that person had counsel, clearly made a knowing and  
11 voluntary choice to and this Court signed that order. This  
12 Court said that we should be doing these by stipulation. We  
13 don't -- we don't believe that individuals can make those kinds  
14 of -- that we're very concerned about coercion given what you  
15 see in the affidavits about, you know, ICE telling people if  
16 you fight your case, umm, you know, you're going to spend a  
17 year and-a-half detention, telling people you've got to sign  
18 this form or you're going to get prosecuted, those kinds of  
19 things, right? So we're very concerned about just, you know,  
20 ethically honestly as a lawyer I don't feel comfortable  
21 stipulating to the removal of someone who is potentially going  
22 get killed if they, you know, just based on form that is  
23 presented to me where I have no idea what information was told  
24 to this person and, you know, whether that person made a  
25 knowing and voluntary choice. We want to make sure that -- we



1 think honestly from the Court's perspective, the Court is going  
2 to want to have assurance that individuals are making, if they  
3 make that choice, it's not done under coercion, but that it is  
4 done knowing and voluntary and with a full information about  
5 what their immigration options are and what their likelihood is  
6 of being in prolonged detention because prolonged detention in  
7 these conditions with this kind of abuse is very, very,  
8 coercive and so, you know, not that people can't make those  
9 choices, people certainly have the freedom to do that, but we  
10 want to know that it's, that it's voluntary and so the process  
11 that we proposed and you have the form as an exhibit was simply  
12 that people would, umm, it's at the, I believe it's the very  
13 last of the exhibits and it's or actually I'm sorry, I believe  
14 it's B, Exhibit B, page ID 2445. So if you look at that form,  
15 you'll see what we're basically suggesting is that this form go  
16 out, individuals say if an individual has an attorney and they  
17 want to be removed, that attorney would contact that Hamama  
18 counsel and the Department of Justice and then we'd enter a  
19 stipulation. Very simple, just is we did in the other case.

20 If an individual's unrepresented, this is where it  
21 really comes up is with the unrepresented individuals. The  
22 individual would say I don't have a lawyer and I want to be  
23 promptly removed and then we would work to identify a lawyer,  
24 not one of the Hamama counsel because we don't want there to be  
25 any conflicts, but an independent immigration attorney who

1     could go out. If the detainee does not want to meet with that  
2     person, there's no obligation to meet with that person, but the  
3     detainee would have the opportunity to meet with an attorney,  
4     find out what their options are, umm, and if -- and then, you  
5     know, would either sign a form or the attorney could submit a  
6     declaration, but there would be a process then based on that to  
7     enter the stipulations for the removal. That way we know that  
8     people are making -- are not making -- are not being coerced  
9     into removal, but are actually given an informed choice.

10           The government's alternative form which you also have  
11     in their exhibits basically function as a waiver, you know,  
12     essentially says I waive my rights, I don't want an attorney,  
13     I'm going to be -- I accept deportation and we're just not  
14     comfortable stipulating to removal under those circumstances  
15     when individuals --

16           THE COURT: Pardon mow. Are you at an impasse on the  
17     notice issue?

18           MS. AUCKERMAN: We are at an impasse on that.

19           THE COURT: Okay. Now as far as the the transmittal  
20     of A-files and requisite proceedings, the government says it's  
21     working on it, it's not so simple, no central location for some  
22     of these documents, have to be reviewed, scanned, so is that  
23     something that you're at an impasse over?

24           MS. AUCKERMAN: I would say that, umm, we are at an  
25     impasse about, less about the timing of the production. There,

1 we really just want to know. We understand it's going to take  
2 some time. How long it takes affects the detention issues, but  
3 we know it takes time. That's why we asked for time to begin  
4 with, but that's time with detention. I think we are at an  
5 impasse on the issue around to whom the class members' files  
6 go. Actually, you know what, I should take that back. I  
7 actually think that there may be some room for discussion  
8 around those issues, would you say? Yeah, I would say that  
9 that's an issue that I think we can, certainly with  
10 facilitation and maybe even without that, that we could work  
11 out.

12 THE COURT: All right. Now what about the production  
13 of detention information? Is that something you still can talk  
14 to the government about or are you at an impasse at that, over  
15 that?

16 MS. AUCKERMAN: I --

17 THE COURT: These are the 90 day review issues?

18 MS. AUCKERMAN: Yeah. I think that would be worth a  
19 conversation today. If we can't resolve it today, it's time  
20 sensitive and so I think we would need to move forward on, get  
21 the Court's direction on it.

22 THE COURT: All right. The status of Iraq's  
23 agreement to accept class members. Is that something worthy of  
24 some more conversation?

25 MS. AUCKERMAN: I don't think we're going to reach

1 agreement on that. I guess what we'd like on that is to  
2 proceed with discovery on that issue. The government has  
3 objections. It can certainly raise those, but that the Court  
4 give a date for response to the discovery that we're serving,  
5 that we'd like to serve of September 15th and then if, you  
6 know, depending on what they produce, if there are issues there  
7 that we can't resolve, then when we come back to the Court  
8 about what is or isn't produced. I think that's the cleanest  
9 way to handle that and I guess I should add there's actually  
10 sort of two separate issues. One is the documents regarding  
11 the communications between Iraq, umm -- well, they're sort of  
12 related. One is getting information about whom Iraq is  
13 actually going to accept and the second is identifying the  
14 individuals whom Iraq is not going to accept so that those  
15 individuals can get released 'cause they shouldn't be detained  
16 and the one sort of follows from the other 'cause we don't know  
17 who's been improperly detained until we know whom Iraq won't  
18 take back. You know, we just don't know. We don't know what's  
19 going on with that.

20 THE COURT: Would that not be an issue that would be  
21 raised in front of the immigration courts?

22 MS. AUCKERMAN: That's a good question, your Honor.  
23 Well, that's really actually a detention issue so it's really  
24 a, it's a habeas. That's a -- I mean, the piece of it that is  
25 of concern to us is whether they're detained while this is

1 going on, right? So you could have the immigration judge say  
2 no, umm, you know, this person has no opportunity for relief,  
3 final order or reaffirm that there's a final order. The person  
4 could be indefinitely detained basically -- well they, I mean,  
5 they can't be indefinitely detained. That's the point. That's  
6 the Constitutional point and it's been decided that they can't  
7 be indefinitely detained, so it's really not the immigration  
8 court that's making that decision, it's really a question of if  
9 there's no foreseeable likelihood that the individual can be  
10 removed, they cannot be incarcerated and for individuals whom  
11 Iraq will not actually repatriate, those individuals can't be  
12 detained because there's no foreseeable likelihood that they  
13 could be returned and we just don't know, we don't know whom  
14 they will or won't take and we don't because we don't have any  
15 of those documents and so we can't identify, you know, say they  
16 said, you know, we won't take people who are not in our  
17 national citizenship database or something, right? Then we  
18 need to try to figure out who those people are and then those  
19 individuals should be, you know, being released, but if, yeah,  
20 so it's a difficult, it's a thorny problem, but it starts with  
21 really figuring out what's going on in terms of these  
22 repatriations. The government is saying that they're, you  
23 know, Iraq will take these people back, but we have instances  
24 of individuals who were in detention, you know, after this  
25 agreement, before this Court's order who were not removed. We

1 have reports of individuals who are being told that they will  
2 not be removed 'cause Iraq won't take them back.

3 THE COURT: Okay, well, let me just interrupt for a  
4 second here. Our focus has been on issues other than the  
5 detention issues. You're now introducing this in the status  
6 report and I've asked before where in our case are we going to  
7 get to the detention issues that are set out in the complaint  
8 and I was told that's something that will come later, stay  
9 tuned, so I am not sure how I'm going to be equipped at this  
10 point to start making decisions about detention issues when we  
11 haven't really briefed any of that and I haven't really seen  
12 what, what your claim is or what my authority is to monitor the  
13 detention system. Is this a little premature in the sense that  
14 you haven't really laid the groundwork for it?

15 MS. AUCKERMAN: I think, your Honor, to be clear  
16 we're not asking you to decide on detention issues right now.  
17 What we're essentially asking for is discovery that is related  
18 to detention. So, you know, there's discovery that could be  
19 had related to the issues that have already been decided and as  
20 we set out in our status report, we don't think that that's a  
21 very productive use of anybody's time. We have gotten to the  
22 point now where detention issues are very ripe and so we don't  
23 think that, umm -- we're not asking the Court to make decisions  
24 on detention. What we're asking for essentially is discovery  
25 related to detention so that we can then depending on what

1 happens, depending on what we find out, come back to the Court,  
2 depending on what we're not able to resolve, right? If it  
3 turns out that Iraq's not taking back X, Y and Z people, I  
4 would hope that the government would agree that those people  
5 need to be immediately released or if it turns out that, you  
6 know, it may also turn out that the government is doing these  
7 custody reviews that are due at 90 days. If it turns out, the  
8 government I would hope would say look, it's going to be a long  
9 time until these individuals, you know, while these cases are  
10 winding their way through the immigration system, these  
11 individuals were living in the community, reporting, they're  
12 not a flight risk, they're not a danger to the community,  
13 they've been living there for a long time and if the government  
14 decides hey, at these 90-day custody reviews we're going to  
15 release almost everybody except for, you know, these three  
16 people who, you know, we're concerned about, we wouldn't be  
17 coming back.

18 (Pause)

19 MS. AUCKERMAN: So essentially what we're trying to  
20 do is actually develop the information so that we can lay the  
21 groundwork for you so that if becomes necessary, we can come  
22 back to the Court. You know, again if most of these people get  
23 released at 90 days, you know, we won't need to come back, but  
24 if that doesn't happen and, you know, we're hearing all sorts  
25 of different things. This is why we need to have information

1 about what's happening because we can't make informed  
2 decisions. This Court can't make informed decisions unless we  
3 know whether or not people are getting released, what the basis  
4 is, if their continued detention, what the basis is. There's a  
5 question, for example, about whether or not individuals are  
6 subject to mandatory detention. There are all sorts of legal  
7 issues around that. There are issues about when there's a, you  
8 know, as the government points out in the brief there's a sort  
9 of six-month period or there's a 90-day period actuality. You  
10 know, we read that statute to run from, you know, back when the  
11 final order was issued; they read it at a different point. All  
12 of those legal issues we can't really brief those or bring  
13 those to you until we actually have the factual background and  
14 that's why we're asking for discovery on that.

15 THE COURT: All right. I'm not making a ruling now,  
16 I'm just gathering information really on a threshold issue of  
17 how should we set up a process, but I do want to alert you to  
18 the fact that for me to make decisions at some future point  
19 regarding discovery, I do need to understand better the nature  
20 of the claim and what you're ultimately seeking because I have  
21 to make some kind of an analysis about whether discovery is  
22 relevant to an issue that I'm going to have to rule on and then  
23 consider what the cost of that discovery is, how proportional  
24 it is to whatever benefit so I can't in a vacuum make a  
25 discovery dispute decision without knowing more about what the



1 claim looks like and how I might have to potentially fashion  
2 relief, but we can talk more about that later. At this point,  
3 I'm just trying to find out what would benefit from further  
4 discussion between you and the government and maybe this is one  
5 of those issues, maybe it's not, I don't know, we'll see. All  
6 right.

7 MS. AUCKERMAN: If I may, your Honor, just on that  
8 point?

9 THE COURT: Yes.

10 MS. AUCKERMAN: I think one of the things that we've  
11 been thinking about is sort of how does this, how does this  
12 case progress and I know that's been on the Court's mind and  
13 we're sort of trying to walk a middle path here. Normally a  
14 case after there's a preliminary injunction, then you move into  
15 discovery, then you move toward summary judgment. You know,  
16 there's sort of a normal progression of how these cases get  
17 handled.

18 What we're suggesting is really that instead of going  
19 into full scale discovery, we try to settle some of these  
20 issues, but that we move into discovery onto, you know,  
21 essentially what we're asking I guess is for permission to move  
22 into discovery on some of these other issues, but we  
23 understand, I mean, that would be the normal course. I don't  
24 know if your Honor's saying that you would need to before  
25 deciding whether we can move into discovery as would normally

1 be done, you would need further information.

2 THE COURT: Well, I can tell you I'm going need to  
3 understand better what role the detention issue plays in our  
4 case because up to this point we've only talked about whether  
5 or not the putative class members have some kind of habeas  
6 right or due process right regarding access to the immigration  
7 court system and the Court of Appeals for review purposes  
8 regarding removal. We haven't addressed at all what is the  
9 legal significance of the fact that many of these putative  
10 class members are detained and potentially being detained for  
11 long periods of time and I'm still not sure what role this  
12 Court is supposed to play in resolving whatever the dispute is  
13 regarding that issue.

14 I don't know if you envision this Court entertaining  
15 bond questions that might be raised by putative class members  
16 or whether you expect the Court to be issuing some kind of  
17 class-wide decision regarding detention issues. I have no idea  
18 because it hasn't been briefed so if you were to ask me now to  
19 order certain information to be turned over in connection with  
20 detention, I think we're going to have to see how we lay the  
21 groundwork for that.

22 In any case, let me just ask regarding future  
23 proceedings, you sort of began to touch on this. It's an  
24 unusual kind of case in which much of what I think the  
25 plaintiffs were seeking was some kind of immediate relief from

1 removal without having an opportunity to present their case in  
2 court and that seems to have been accomplished, so I'm trying  
3 to understand what further proceedings we may need to  
4 anticipate and schedule for. I know what we've already  
5 scheduled is the motion for briefing on class certification. I  
6 don't know whether that's an important undertaking for us to  
7 pursue right now or whether we should be pursuing these other  
8 issues or whether we should be engaged in a multi-front kind of  
9 exercise here, so let me throw that out as another essay  
10 question for you. How do you view the future of the  
11 proceedings here?

12 MS. AUCKERMAN: So it's, it's still -- you can ask  
13 the government this. To our knowledge they have not yet made a  
14 final determination about an appeal of this Court's preliminary  
15 injunction order so we're waiting to see what happens with  
16 that. There -- there are a couple different possibilities.  
17 One of the things obviously would be to, for the parties to go  
18 into discovery and then sort of broad-scale discovery and then  
19 essentially seek summary judgment on the same issues that were  
20 before you before with respect to, umm, that were decided in  
21 the preliminary injunction that would essentially be kind of  
22 the equivalent of like a consent order in an institutional  
23 litigation case or something like that, right, with subsequent  
24 monitoring to make sure that it's all sort of handled  
25 appropriately, that kind of thing. That would be one option.

1 We think that's a lot resources just given the sort of unusual  
2 nature of this case and the fact that things are time  
3 sensitive. I think that, you know, we could spend, you know we  
4 could all spend, you know, eight months, the Court could spend  
5 an enormous amount of time on that and, you know, by the time  
6 that the Court would make that decision, it would -- most of  
7 these cases might have been decided or be pretty far along so  
8 we don't think that's a particularly wise investment of  
9 anybody's time.

10 On the other hand, we are very, very concerned about  
11 the detention issues and it's a little bit of a chicken and the  
12 egg problem. We certainly understand that the Court wants to  
13 understand more. We have not, you know -- our priority was to  
14 make sure that people were not sent back to Iraq and tortured  
15 or killed, but, you know, and we're obviously very pleased that  
16 the Court has prevented that from happening while individuals  
17 access the immigration system. The problem that we're  
18 confronting today is that these individuals are in detention  
19 and for us to be able to provide the Court with -- to figure  
20 out what this Court's role if any might be in that, we need to  
21 understand what's going on because depending on what happens,  
22 there may or may not -- there would be different roles for this  
23 court or maybe no role for this Court. We don't really know  
24 because we don't know what's happening so again if everybody  
25 gets released or if most people get released, there's a rubber

1 stamp process. If there's other habeas actions that are filed  
2 by individuals. I mean, there's a whole series of things that  
3 could happen with respect to detention and some of the legal  
4 standards are also really important. So to give you an  
5 example, it is our view that individuals who have a motion to  
6 reopen granted are not, would not fall within the mandatory  
7 detention standard because of the lapse in time. The  
8 government's view is the opposite so there are sort of legal  
9 issues that affect large numbers of people with respect to  
10 detention, but we don't know which ones those are because we  
11 don't know how many people are being detained who are, you  
12 know, fall into these different categories, those kinds of  
13 things and so what we're trying to do is get the information so  
14 that we can educate ourselves and determine what an appropriate  
15 role for this Court, if any, there might not be one, we  
16 don't -- we think that there may be because we're concerned  
17 that there, you know, that this detention is going on that  
18 there is going to be a rubber stamp process, but we need to  
19 know whether, what happens in order to be able to come back to  
20 this Court and say this is what's going on, this is the relief  
21 that we're requesting and we can't make an assessment of that  
22 until we know what's actually going on on the ground and we  
23 just don't have that information.

24 THE COURT: Well, I assume you have some facts  
25 regarding improper detention of somebody even if you don't know

1     how wide-spread the alleged, allegedly illegal process or  
2     practice is. In other words I assume you're not just saying  
3     well the government may be doing something wrong so give us  
4     discovery to see if they are. Don't you have some facts, some  
5     individuals who have suffered some kind of allegedly  
6     unconstitutional or otherwise illegal process regarding their  
7     detention?

8             MS. AUCKERMAN: Right, so the question is is really,  
9     so for example with respect to final orders of removal, the  
10    statute provides that for a 90-day period of detention,  
11    mandatory-90 day period of detention after the final order of  
12    removal is issued. The government takes a position that that  
13    process applies when the people are re-detained. Our view is  
14    that that is not the case, that all of these individuals should  
15    have had custody reviews basically right away to determine if  
16    they're flight risk and they should have been released if they  
17    weren't in danger of flight risk.

18            As a practical matter, we're close to the 90 days and  
19    so our view is let's see what happens with those 90-day reviews  
20    and then, you know, move forward after that. Our view is that,  
21    you know, a lot of this detention should -- there should have  
22    been an individualized determination much, much earlier.

23            THE COURT: Well, I guess what I'm saying is it  
24    doesn't sound like it's discovery issue as much as it's simply  
25    a legal issue. There must be at least one person, you're

1 saying there are many, maybe all who are at this point where  
2 the government is improperly applying the 90-day rule, right?  
3 So does it make a difference for your purposes whether that's  
4 happening to two people, 20 people, 200 people. If you want me  
5 to rule that that's illegal, why don't you file a motion and  
6 have me rule on it?

7 MS. AUCKERMAN: Because I -- our -- what the relief  
8 we would be requesting may as a practical matter happen if the  
9 government releases these individuals in the 90-day custody  
10 reviews, so we thought as practical matter let's see what  
11 happens --

12 THE COURT: But after that -- I understand, so after  
13 that period, would you be in a position then to file a motion  
14 for a ruling?

15 MS. AUCKERMAN: If we know what's happening with  
16 these individuals which we don't unless we get discovery and  
17 the same thing with respect to the individuals who get the  
18 motions to reopen granted and then would be eligible for bond  
19 hearings. If the government takes the position which we don't  
20 know whether they're going to take that position because they  
21 haven't, they haven't told us. If the government takes a  
22 position that those individuals are subject to mandatory  
23 detention and we think they're not and, you know, we're being  
24 told that they're likely to be found that, but we don't know  
25 because we haven't seen their custody reviews. If they're

1 still detained without a bond hearing to determine whether they  
2 can be released, you know, so that's why it is a bit of a  
3 chicken and the egg problem, your Honor. I don't mean to make  
4 this difficult, but it is -- we really want to be able to  
5 present you with --

6 THE COURT: It's okay. It's okay to make things  
7 difficult. I don't mind trying to solve difficult problems.  
8 They're more challenging sometimes, but if you have any simple  
9 problems, I'm happy to try to resolve those, too.

10 MS. AUCKERMAN: We'll try to present both, your  
11 Honor.

12 THE COURT: All right. So let me get back to the  
13 issue of class certification. Is there any pressing need to  
14 resolve that? As we look at all the things we need to cover in  
15 case in the immediate future, we have all of these discovery  
16 issues, adjustments potentially to the injunction order, I'm  
17 just trying to prioritize. In your view, how important is it  
18 for us to take up the issue of class certification?

19 MS. AUCKERMAN: Your Honor, we'd effectively been  
20 proceeding as class counsel here and, you know, the Court has  
21 already issued class-wide relief. We don't see that as one of  
22 the highest priority issues, certainly in terms of there are  
23 other things that are much more important here I think in terms  
24 of the Court's attention and the parties' attention.

25 THE COURT: Okay. All right. Was there anything



1 else you wanted to mention then regarding what's at impasse,  
2 what isn't at impasse?

3 MS. AUCKERMAN: I think that -- thank covers it, your  
4 Honor.

5 THE COURT: Okay. All right, let's do this. Let's  
6 take a short recess. We'll come back at 3:30. Thank you.

7 (Recess taken at 3:13 p.m.)

8 (Reconvened at 3:40 p.m.)

9 THE CLERK OF THE COURT: Please rise. Court is back  
10 in session. You may be seated.

11 THE COURT: All right. Mr. Silvis, do you want to  
12 share your views on where you think there may be an impasse and  
13 where you think there might be some basis for further  
14 discussion?

15 MR. SILVIS: Yes. Thank you, your Honor. I'd like  
16 to start with I think what would be good news. We've had an  
17 opportunity to talk during the break about some of the issues  
18 and I think that there's no -- we can either put off or further  
19 discuss with both sides. One of the first issues is that we'd  
20 requested and respondent status report to move the reporting  
21 dates by this Court's preliminary injunction order to  
22 Wednesdays instead to allow for more complete reporting or more  
23 timely reporting. The petitioners' counsel indicated that they  
24 didn't object to that so beginning with the report that would  
25 be due this coming Wednesday, we would ask if the Court could

1 modify the order and allow it to be reported every other  
2 Wednesday instead of Monday.

3 THE COURT: Okay, that's fine.

4 MR. SILVIS: In terms of, I think we discussed a  
5 little bit about the A-files and ROPs and once those are ready  
6 to be distributed, where those should go. We had an  
7 opportunity to talking about that a little bit and while  
8 there's not entire agreement on that just yet, I don't -- I  
9 think we agreed that we would talking about that issue a little  
10 bit more and determine where it should go. It's sort of a  
11 logistics issue in addition to some privileges issue and who  
12 can receive it and what kind of waivers and privacy waivers  
13 would have to be executed before, so again I don't think that's  
14 anything for the Court's consideration today that really needs  
15 to be resolved and I think petitioners' counsel agrees on that.

16 Working I think a little bits backwards first where  
17 we finished off, I understood the Court's questions and  
18 statements about additional discovery that was being requested  
19 by petitioners' counsel to be a little premature and if that's  
20 the case and the Court isn't inclined to order additional  
21 discovery on, it's essentially three categories of information  
22 that was identified in petitioners' status report. It's  
23 information on POCR reviews which are post-order custody  
24 reviews, information on bond hearings and then any information  
25 related to Iraq's acceptance of nationals and like I said, I

1 understood the Court's questioning of petitioners' counsel to  
2 indicate that it wasn't inclined to order that at this time and  
3 if that's the case, I'm happy to move on and discuss --

4 THE COURT: Well, I'm not making any rulings here.  
5 This is just a conference, the purpose of which is for me to  
6 gather more information about the issues that are separating  
7 the two sides. I was expressing some concern that to the  
8 extent parties are asking for discovery regarding issues that  
9 haven't concerned us at all in the case. I'm going to need  
10 some more education about those issues. I don't want to  
11 suggest I wouldn't order it, but I would need to see where that  
12 fits into the case and that's all I meant to say about that.

13 MR. SILVIS: Okay, well then I'll just add just to  
14 sort of put the government's position on that, I think that in  
15 terms of any discovery that would be ordered to that, I mean,  
16 that's extremely premature. I mean, we're at the, there's  
17 Supreme Court decision Zadvydas that is directly on point for  
18 post-order detention which is what the majority I think of the  
19 putative class here would fall under and, you know, that's  
20 presumptively reasonable for six month and after that period of  
21 time it would be a burden upon any individual petitioner to  
22 demonstrate that the removal is not reasonably foreseeable in  
23 the -- immediately plausible in the reasonably-foreseeable  
24 future. So I think that there's no allegation that anyone is  
25 close to that six-month point and then even beyond that, it

1 would still be their burden so it sort of goes to the  
2 difficulties of litigating this as a class action which we'll  
3 address with our opposition on September 11th, but, you know,  
4 it's just, in more detail, I mean, I think it's -- that really  
5 the controlling law here and we don't really see how the POOCR  
6 reviews which the POOCR reviews are also provided directly to  
7 the detainee so it's not as if no one's getting that, but, I  
8 mean, I guess class counsel wants them in this case, but it's  
9 extremely premature I think to get into into given the  
10 presumptively six-month period that we would have before a  
11 claim would even be ripe and then the burden would shift. So I  
12 think it's premature there.

13 This terms of the discovery generally, too, we  
14 haven't had a full Rule 26F. If we were going to get into the  
15 discovery phase of this case, I think it would have to be  
16 discovery both ways and we may very well want to do discovery  
17 on several of these affidavits that have been produced in this  
18 case and the declarations and I don't know that the case needs  
19 to go there at this point. I think it's, there's still a  
20 motion to dismiss that is, you know, coming up, that would be  
21 coming at the end of this month or the end of September and the  
22 class certification that needs to be worked out as well, so I  
23 don't think we've moved into that discovery phase, but, you  
24 know, if we do and if the Court's intention is that we move  
25 there, that, you know, it would have to be full-fledged

1 discovery and I think we would have our 30 days to respond and  
2 raise objections to anything that they had wanted to get in  
3 that. So I think that again that we really haven't flushed out  
4 the post-order, the post -- the different discovery issues that  
5 would be related to detention, so that's our position here that  
6 it and really this status conference was sort of set up as in  
7 the Court's order granting the preliminary injunction about  
8 modifications to that order and this really, this detention  
9 issue really wasn't part of it. They specifically didn't move  
10 on their preliminary injunction on the detention issue so I  
11 think it's far afield from the purposes of this status  
12 conference today, but in any event, our position is that it's  
13 premature as Zadvydas controls and anyone who has a motion to  
14 reopen granted, they no longer have a final order and then it's  
15 just extremely fact intensive and specific to that individual.  
16 You may have a mandatory detention. You may have committed a  
17 crime that makes you subject to mandatory detention and then  
18 you'd fall into one group and some evidence might be relevant  
19 there. Other people, would they might be entitled to bond  
20 hearings and so there's a lot of different permutations of  
21 people that are in the current classes defined for the Court  
22 for the PI, so there's and these are also issues that really  
23 are just by immigration court's in habeas, I mean district  
24 courts in habeas every day, but that's why you see that they're  
25 usually individual cases, but all of these people are in

1 different circumstances and depending on if their motion to  
2 reopen's granted, where there are in their immigration  
3 proceedings, the detention authority and the arguments are  
4 going to be entirely different, so but in any event we think  
5 we're not their, but if we do move into discovery, it's got to  
6 be discovery for both sides.

7           Let's move to I think the big issues that we've  
8 touched on here -- oh, before I get, got to the big issues, I  
9 also wanted to mention that I think we talked here a little bit  
10 about whether there needed to be modification to protective  
11 order. That's another issue I think that there's temporary  
12 agreement on that we'll get back to the Court on. The issue  
13 there is just whether certain information can be shared with  
14 counsel that may enter as, and file amicus briefs on behalf and  
15 really it's a legal issue that needs to be I think resolved to  
16 determine whether that's information, but I think petitioners'  
17 counsel agrees that we can talk more about that and the Court  
18 doesn't need to make any determinations on that.

19           The big issues I think get to the class definition  
20 and when I say class, we haven't gotten the to the class  
21 certification phase yet. The relieve that's been offered in  
22 the reporting that's been ordered in this court has been sort  
23 of on a class-wide basis, but under a PI, before a class  
24 certification has taken place and there's been a bit of a  
25 disagreement. The petitioners asked when they filed the

1 lawsuit there was one class definition of a putative class and  
2 then they requested that the Court sort of modify it to clean  
3 it up so that it would be anyone who had a final order as of  
4 June 24th, 2017 and that's the reporting that we've done to  
5 this and the government's position is, you know, that is in  
6 terms of the fact that there's a class, either for the  
7 protection of the PI and for the reporting, that's who's  
8 covered by the class and to the extent that the plaintiffs or  
9 petitioners now want to modify that, I would urge the Court not  
10 to do so because we've already started the reporting on this  
11 way and to some extent it's also the definition that they've  
12 asked for in their motion for class certification, so I don't  
13 know how it would affect that motion, but if they now want to  
14 modify their definition of who is a class member, I think, you  
15 know, it creates problems there.

16 I think it also creates problems from a sense of what  
17 the relief, the ultimate relief everyone's seeking in this case  
18 because when we brought this case and we've made the, appeared  
19 here several times making these arguments, the issue was  
20 seeking, having time to seek access to the immigration  
21 administrative proceedings and having time to file a motion to  
22 reopen and having those opportunities, but for individuals who  
23 have had that opportunity, have filed a motion to reopen and  
24 actually had it granted, we don't think they belong in the case  
25 at all. I mean, they've gotten what they could possibly get

1 from this Court in terms of protection. Now they're in the  
2 immigration system. They've filed their motion to reopen.  
3 They have the ability to get the relief that they want. To the  
4 extent that they're entitled to it and can show to an  
5 immigration judge or to the BIA or, you know, on a PFR to the  
6 Court of Appeals, they're already into that system and they no  
7 longer need the protection of this Court's order in terms of  
8 the injunction and in terms of reporting, we should be -- the  
9 government should be relieved of the obligation to continue to  
10 report on people whose motions to reopen have been granted.

11 So I guess the class definition and again will be,  
12 the class certification issue will become more ripe in a couple  
13 weeks, but in terms of for right now when we're talking about  
14 the reporting and the injunction -- and compliance with this  
15 Court's preliminary injunction, we think that anyone granted a  
16 motion to reopen should be excluded from that.

17 I think that leaves the biggest issue, point of  
18 contention which is the issue for people who want to be  
19 excluded that no longer want to be a part of this case and I  
20 think the disagreement has been, it started in the sense that  
21 individuals had approached ICE and detention officers and asked  
22 that, you know, they didn't want to be part of the case and  
23 they wanted to, to return and the Court's order provides that  
24 people can, individuals in that situation can specifically  
25 request that. They can be excluded from the order either by



1 stipulation or some sort of a motion to the Court whether the  
2 the Court would consider, so the parties have discussed how to  
3 go about doing that and I think everyone agrees that there  
4 needs to be some notice that would go out so that people could  
5 indicate their intent. To date, what has happened is  
6 individuals have approached detention officers and expressed  
7 their, their desire to leave, but we think there may be other  
8 people and what we want to get and I think everyone agrees that  
9 there could be a notice that would go out so anyone who doesn't  
10 want to be part of this, this case could inform the parties by  
11 a notice another way and return that notice and we could start  
12 the process for seeing if these people should be excluded or  
13 not.

14 THE COURT: This should be a notice that goes out to  
15 the entire class of some 1,400 people?

16 MR. SILVIS: Yeah, well, I think it only matters --

17 THE COURT: Less people who are already represented  
18 or filed their motions?

19 MR. SILVIS: Well, it's not 1,400 to the extent that  
20 there's, umm, it's the people that are -- theoretically could  
21 be, but it's a bigger problem for the people who are detained  
22 because once you're detained, then I guess people could exclude  
23 before, but then it gets in a little part about the or may be  
24 detained in the future, but most importantly I think for the  
25 detained population now so I guess we didn't talk about it with

1 the greater class of the other 1,400, but --

2 THE COURT: You were focused on the detainees?

3 MR. SILVIS: Correct, correct and that's where I  
4 think it started and the concerns that the petitioners have  
5 about coercion and the concerns the government has about  
6 keeping people, you know, detained longer than they want to be  
7 who actually don't want any part of this and want to be  
8 returned and are not expressing a fear or if they are, even if  
9 they are, they're not, you know, they're not going to pursue it  
10 in court so, umm, that's where the process I think, the  
11 government would like to have a form and this is sort of a  
12 question for the Court as well is what kind of process would  
13 satisfy the Court that an individual and this really falls to  
14 individuals who are unrepresented 'cause if a person has an  
15 attorney like the individual who when at the start of this case  
16 opted out and has an attorney, I don't think we have much of an  
17 issue and the I think the petitioners' counsel would agree,  
18 but --

19 THE COURT: What's wrong with the proposal of the  
20 petitioners that some pro bono lawyer would make himself,  
21 herself available to a detainee to explain this litigation and  
22 the options that the person has? What's the government's  
23 objection to that?

24 MR. SILVIS: I don't think -- there isn't any problem  
25 per se with anyone meeting with them if the individual wants to

1 meet with an attorney and if the petitioners' counsel is  
2 willing to set that up. What we want is a form, a notice form  
3 that we've drafted and it's Exhibit A I believe to our filing  
4 that once it's given to an individual, they can express, you  
5 know, whether they want to be -- whether they're represented to  
6 begin with because if they're represented, they shouldn't be  
7 returning the form at all, but if they're unrepresented and  
8 they want to go and be returned, we want some evidence of that  
9 intent so that when we're later coming to court, either on a  
10 stipulated basis or as a contested motion to say to the Court  
11 look, these are the individuals that want to go, we want this  
12 Court to have some assurance that they, that this really is  
13 their intent. It's not too different than forms you'd see in  
14 immigration proceedings with people like voluntary departure or  
15 other things where you have an individual who is unrepresented  
16 and can express, you know, their own understanding of the form,  
17 that it was read to them in a language that they understand and  
18 are waiving any right or part of this case and that's the type  
19 of form we want, some sort of evidence that we could bring to  
20 the Court after the fact, but, you know, if -- and here is  
21 where it seems like the process broke down unnecessarily, but  
22 if that form were provided to everybody, we still don't -- the  
23 government doesn't have any objection with if that form came  
24 back both to the petitioners' counsel and to the government  
25 counsel, we had that form, we shared the form, we said these

1 individuals want to go, look, they've expressed their desire,  
2 they're not represented, then we'd still be open to a time  
3 period where they could contact this individual and if the  
4 person wanted to meet with counsel, they could meet with them  
5 and see if, you know, that was a knowing and voluntary waiver  
6 in their opinion and then maybe it would become a contested  
7 motion at that point, but what we're concerned about is that we  
8 would have some sort of blank form that just indicates  
9 someone's desire and then their -- the timing is very much then  
10 controlled about whether this meeting ever happens between, you  
11 know, the attorney that doesn't actually represent them, this  
12 is just an attorney who will go meet them to talk about the  
13 rights in this case and then what would we do at that step?  
14 How would we show that there was any intent to the Court so the  
15 person we could either stipulate to it or, you know, that we  
16 could just file with the court?

17           So in any event I guess the short of it is we want  
18 some form that demonstrates the intent that the person actually  
19 wants to go and we don't have any objection with them in some  
20 reasonable time frame meeting what an attorney before if that  
21 person wants to and if petitioners' counsel's going to  
22 facilitate it, but we want some sort of evidentiary intent  
23 expressed on it so that, you know, 'cause then the next step is  
24 trying to convince this Court that this was some sort of waiver  
25 and then we don't really have any way of doing that I don't

1 think unless we're going to do a separate stipulation for every  
2 person and write out and where is the person going to sign,  
3 they don't have a counsel. I think it's just much easier to do  
4 it the way that the government has done and it really  
5 represents I think the petitioners' interests as well because  
6 no one's saying they don't have the opportunity to meet with  
7 someone before, with an attorney before, but we don't want that  
8 process to hold up. If we give them a reasonable period, a  
9 week or, you know, we can agree on what a reasonable period  
10 would be to facilitate those meetings, but once that's  
11 happened, umm, you know, we want some kind of evidence at that  
12 point if that person really wants to go, that they can go and  
13 we're not just detaining them, you know, against their wishes.  
14 So that's kind of where it's broken down.

15 I think the parties fundamentally see the process as  
16 being different and I think part of it's a question for the  
17 Court, just what would satisfy the Court after that, that  
18 phase? Would it, you know, I imagine the Court would want  
19 everyone to come into court and sort of allocate or say that  
20 they wanted to leave, but there has to be some sort of  
21 indication of the person's intent in these cases where there's  
22 no attorney involved. So that's, that's sort of our position  
23 on it and I just think that that may if the Court would like us  
24 to meet with the magistrate and try to talk it out or if the  
25 Court has any opinions that could be helpful in what would

1 satisfy the Court in terms of that group of unrepresented  
2 people that no longer want to be part of the lawsuit.

3 Let me just check, if you will excuse me for a  
4 moment.

5 (Pause)

6 MR. SILVIS: I think this is covered in part about  
7 when we were talking about the class definition in terms of the  
8 relief and the reporting requirements, but for those  
9 individuals who have already had a motion to reopen, we would  
10 say, I think the Court should, the PI should be modified to the  
11 extent that the reporting requirements actually providing the A  
12 file and the ROP to those people and they've already had the  
13 opportunity to file a motion to reopen, they have the ability,  
14 they no longer have the final order, the removal is no longer  
15 imminent, you know, they have an opportunity now to pursuit  
16 relief that they have and they can supplement the A file. I  
17 mean, it's primarily for these cases that are claims in that  
18 it's based on changed country conditions and the fact that  
19 they're afraid to go now so any reporting that we would have  
20 for those people whose motions to reopen have been granted, I  
21 think they should be released from the class and also in terms  
22 of the class, it's -- for individuals who are not detained, we  
23 think that they should be excluded from the PI order both for  
24 the reporting and also for providing of files and we'd ask for  
25 a modification there because again the concern here was that

1 the detained individuals would not have the ability to access  
2 counsel. They wouldn't have enough time to file the motions to  
3 reopen and they wouldn't have any of the resources, you know,  
4 from being detained, the same resources aren't available to  
5 them, but at this point there's a group, the majority of the  
6 class hasn't been detained. They've known about or presumably  
7 knew about the situation in Iraq and the fact that their  
8 removal could become, maybe they didn't think it was going to  
9 happen any time soon, but they should be aware at some point  
10 that there's a lawsuit and that this is happening and they  
11 don't have the same interests as the the detained people here  
12 in the sense of not being able to access counsel, they don't  
13 have the same interests, they can file a FOIA request and so  
14 they have a different situation and the removal doesn't seem  
15 imminent at all, so to the extent that the Court would  
16 entertain modifying the PI for that group of people, the  
17 reporting and the production of files, that the government  
18 requests that we don't think that they really are, umm, the  
19 interests that the suit was brought for really, umm, that they  
20 can obtain that relief on their own at this point.

21 THE COURT: All right. When is your responsive  
22 pleading due?

23 MR. SILVIS: They -- I have it docketed, it's the end  
24 of September. I don't remember the exact date. I have it  
25 here, but I know --

1 THE COURT: And you're contemplating a motion to  
2 dismiss?

3 MR. SILVIS: I believe so, your Honor.

4 THE COURT: Do both sides think it would be helpful  
5 to meet with the magistrate judge to try to resolve the case  
6 globally sooner rather than later?

7 MS. AUCKERMAN: We do, your Honor.

8 MR. SILVIS: We'd be willing to talk.

9 THE COURT: All right. Well, I know he has  
10 availability. I did in advance of this conference try to find  
11 out what he looked like in terms of trying to schedule a  
12 session and he said although he is busy, he would certainly it  
13 fit you in. I do think that's something we should have you  
14 explore.

15 My other conclusion is that it seems to me that there  
16 are a number of issues here where both sides acknowledge you  
17 might be able to close the gap and reach an agreement if you  
18 talked some more. There are some issues where you say you're  
19 at an impasse, but it wouldn't shock me to discover that what  
20 seems like an impasse today might blossom into some kind of  
21 resolution so I do think the two sides should continue to talk  
22 for some period of time to try to see how many of these issues  
23 they can resolve.

24 What I'm envisioning is after you've had that  
25 opportunity to try to work out these issues, that you would



1 then send me a fresh status report. It would be a single  
2 document, a joint report where you'd layout for me what the  
3 issue is and each side's position about how the Court should  
4 resolve it and I may decide that after receiving that I'd need  
5 to sit down with you and talk with you some more about it or I  
6 might be able to just issue an order that resolves the issues.

7 I'm also of the view that the highest priority would  
8 probably be to see if you can globally resolve the case. I  
9 think the next priority then is if you can't, that we resolve  
10 all of these outstanding issues to the extent you cannot  
11 resolve them through your own devices and then a lower level of  
12 priority it would seem to me is dealing with the class  
13 certification issue and the motion to dismiss which will  
14 envelope us in a significant round of briefing and occupy us  
15 greatly. I'm happy to have you March down all these paths at  
16 the same time if you want to throw enough lawyers into it or  
17 enough of your own time, I don't know how much sleep you folks  
18 need. Most people need about eight hours, but if you want to  
19 cut it back, that's okay with me.

20 I suppose one way to try to rationalize this would be  
21 to meet with the magistrate judge, see if he can work his  
22 magic. A global resolution obviously makes all this other  
23 stuff irrelevant. If that can't happen, then perhaps the  
24 second phase would be to try to have you sit down, work out  
25 these issues to the extent you can, these discrete issues that

1 we've been talking about all afternoon and then sending me a  
2 joint status report on what remaining issues there are and I  
3 could then meet with you and/or simply just resolve the issues  
4 without a further meeting with you and then we can take up the  
5 motion to dismiss I would think before the certification motion  
6 because if the government's right about that, certification is  
7 of course irrelevant, so I'm happy to try to schedule this in a  
8 way that makes sense for the lawyers and their clients of  
9 course, so do you have a view at this point how you'd like to  
10 proceed?

11 MS. AUCKERMAN: Could we just have a few minutes to  
12 discuss that, your Honor?

13 THE COURT: Sure. I'll tell you what, let's do this.  
14 It may be helpful for both sides to talk to each other. If you  
15 want to use my jury room, my clerk will escort you back there  
16 if you'd like to talk together. Maybe you want to talk within  
17 your own groups first and meet there, but I'm going to be  
18 around for a while so I'd like to give you that chance and then  
19 by the close of the afternoon let's see if we can come up with  
20 a way to proceed. Does that work for you, Mr. Silvis?

21 MR. SILVIS: Your Honor, I would ask that maybe we  
22 would be able to -- I'm going to have to consult with people in  
23 Washington about just sort of 'cause there are a lot of moving  
24 parts in the case at this point as to what the preference would  
25 be in terms of the class cert and motion to dismiss and that,

1 so I guess what I would ask is that if we adjourned today, that  
2 we would provide either a joint statement or our positions just  
3 on the scheduling issue.

4 THE COURT: How much time do you need to consult with  
5 other people?

6 MR. SILVIS: The latest I think would be by Tuesday,  
7 but I think --

8 THE COURT: Okay.

9 MR. SILVIS: -- it just depend on, it's a holiday  
10 weekend, so I don't know it's the last one before spring starts  
11 so I don't know that everyone's going to be in tomorrow, but I  
12 just want to make sure everyone has a chance to weigh in.

13 THE COURT: Sure. Why don't we set up a telephone  
14 conference for next week, how's that, and by that point you,  
15 Mr. Silvis, can talk to whoever you wish to talk to and then I  
16 think the two sides should be talking to each other and see if  
17 there's a consensus about how to do this and then before the  
18 phone conference, I just ask you to send my clerk an e-mail  
19 that indicates what agreement if any you have on our procedure  
20 here or what your different points of view are on that. So I'm  
21 looking at next week. Gee, I have nothing scheduled on Monday.  
22 Are your schedules pretty free? How about on Wednesday, I  
23 could do it late in the afternoon, 4:00. Would that work,  
24 Wednesday afternoon?

25 MS. AUCKERMAN: That works for us, your Honor.

1 MR. SILVIS: Yes, your Honor.

2 THE COURT: Okay. So let's have a telephone  
3 conference at 4:00 p.m. on Wednesday, September 6th and please  
4 send me your e-mail by noon that day that sets out what  
5 agreement, if any, you've reached and what your separate  
6 positions are on how we should proceed. Okay, anything else?

7 MR. SILVIS: Just a couple and I don't know if  
8 there's just, there was a point we made in the joint status  
9 report about -- if I may approach, about the reporting on the  
10 PFR, the petition for review process and I was just notifying  
11 the Court that that's not information -- it's part of the PI  
12 reporting requirement at this point. It's not information that  
13 is in, within the control of the respondent, ICE in this case.  
14 We are, like a lot of the other information in this case that  
15 we've been providing that is provided by EO or DOJ. We are  
16 looking into whether we can provide that in a way to  
17 petitioners' counsel, but in the event I guess I wanted to  
18 notify the Court that that hasn't been provided to date because  
19 it's not something that we have, but that we are looking into  
20 doing it, but we would just ask that that be if there's no  
21 practical way to do that without looking at each individual  
22 things for PACER, we would just ask to be relieved of that, but  
23 I just wanted to notify on that point.

24 THE COURT: All right. Well, let's take up these  
25 issues then when we talk next time and again maybe that's

1 something the two sides can talk about before our next  
2 conference and see if you can reach agreement about that.

3 MR. SILVIS: And would also be the time when your  
4 Honor would want to talk about scheduling the magistrate or did  
5 you intend to --

6 THE COURT: By that point I'll know what his schedule  
7 is precisely and maybe I can get you dates that you'd be able  
8 to sit down with him.

9 MR. SILVIS: Okay. I think that'll be something, but  
10 I just ask maybe that we don't schedule that before we have an  
11 opportunity to talk on Wednesday because I think the  
12 government's preference would be that unless those dates change  
13 this coming Wednesday, that we would prefer that the, sort of  
14 the global settlement discussion be later if that was something  
15 the Court wanted us to do because I think there's a lot of  
16 moving parts that we need to discuss first and if we schedule  
17 that some time in September, I don't know that we'd be ready to  
18 go down that road.

19 THE COURT: You mean you wouldn't be ready for a  
20 sit-down with the magistrate judge in September?

21 MR. SILVIS: I don't think so unless a lot of these  
22 others dates changed. I think there's still a lot of decisions  
23 that need to be made about the case and we might have some  
24 clarity after next Wednesday, but I just ask that the Court not  
25 schedule it before --

1           THE COURT: No, I'm not going to schedule anything  
2 until we have our phone conference. I'll find out what his  
3 availability is.

4           MR. SILVIS: All right, great. Thank you.

5           THE COURT: If you do want to talk to each other now  
6 if you think there's anything useful you can accomplish by  
7 talking, just let my clerk know and he'll make the jury room  
8 available to you. Is there anything else?

9           MS. AUCKERMAN: No, your Honor.

10          THE COURT: Mr. Silvis?

11          MR. SILVIS: No, your Honor.

12          THE COURT: Okay. Then that concludes our session.  
13 Thank you.

14               (Hearing concluded at 4:17 p.m.)

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C E R T I F I C A T E

I, David B. Yarbrough, Official Court  
Reporter, do hereby certify that the foregoing pages  
comprise a true and accurate transcript of the  
proceedings taken by me in this matter on Thursday,  
August 31st, 2017.

9/1/2017

Date

/s/ David B. Yarbrough

David B. Yarbrough,  
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